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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 192

UNITED STATES OF AMERICA EX REL. NICOLO IMPASTATO, *Petitioner*,

vs.

J. L. O'ROURKE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Supreme Court of the United States

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UNITED STATES OF AMERICA EX REL. NICOLO IMPASTATO, *Petitioner,*

vs.

J. L. O'ROURKE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Nicolo Impastato, respectfully petitions that a writ of certiorari issue out of this Court to review a final judgment of the United States Court of Appeals for the Eighth Circuit, entered May 18, 1954, at which time said court denied petition for rehearing, thereby affirming the denial of a writ of habeas corpus by the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The opinion of the District Court is printed in the record (R. 159). The opinion of the Court of Appeals is reported in 211 F. 2d 609, and is also printed in the record (R. 186).

JURISDICTION.

The opinion of the Court of Appeals for the Eighth Circuit was filed April 21, 1954, and judgment was made final by denial of petition for rehearing May 18, 1954. An order was made by that court staying the mandate until July 8, 1954, pending the filing of this petition for writ of certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C., Section 1254 (1) and 28 U. S. C., Section 2101.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether the hearing accorded petitioner on the issue of his date of entry and requirement of a visa was *not* a fair hearing inasmuch as the finding of the Special Inquiry Officer that petitioner entered after July 1, 1924, without a visa, was not supported by a residuum of legal evidence.

2. Whether the petitioner satisfied the provision of the Immigration laws requiring an inspection at the time of entry by affording the Immigration Service an opportunity to inspect him, notwithstanding the Immigration

inspector failed to utilize such opportunity to make a thorough or adequate inspection.

If the answers to the foregoing questions are in the affirmative, then

3. Whether the Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.* (8 U. S. C., Sec. 1101 *et seq.*) is retroactive in operation so as to make petitioner deportable under Section 241 (a) (11) thereof because of his conviction of a narcotics violation despite the recommendation of the trial judge who sentenced him, made pursuant to Section 155, Title 8, U. S. C., and Section 175, Title 21, U. S. C., that he not be deported.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the following statutes and constitutional provisions, the pertinent texts of which are set out in the appendix:

Sections 241 (a) (1), (2), (11) of the Immigration and Nationality Act of 1952, 8 U. S. C., Sec. 1251 (a) (1), (2), (11), 66 Stat. 204.

Section 242 (b) (3), (4) of the Immigration and Nationality Act of 1952, 8 U. S. C., Sec. 1252 (b) (3), (4), 66 Stat. 208.

Section 405 (a), of the Immigration and Nationality Act of 1952, 8 U. S. C., Sec. 1101 note, 66 Stat. 280.

Constitution of the United States, Amendment 5.

STATEMENT OF THE MATTER INVOLVED.

Petitioner filed an application for writ of habeas corpus in the District Court to secure his release from the custody of respondent, the District Director of the Immigration and Naturalization Service, who was detaining petitioner pursuant to a warrant charging petitioner with being an alien in the United States in violation of the immigration laws (R. 1). Subsequent to his arrest, petitioner had been given a hearing by a Special Inquiry Officer of the Immigration Service (R. 9), in the course of which three charges were lodged against petitioner, namely: (1) Under Section 241(a)(1) of the Immigration and Nationality Act of 1952, Section 1251(a)(1), Title 8, U. S. C., petitioner was an excludable alien at the time of entry in that he was an immigrant not in possession of a valid visa, as required by the Act of May 26, 1924; (2) under Section 241(a)(2) of the Act of 1952, Section 1251(a)(2), Title 8, U. S. C., petitioner is unlawfully in the United States because not inspected at the time of entry; and (3) under Section 241(a)(11) of the Act of 1952, Section 1251(a)(11), Title 8, U. S. C., petitioner is deportable because he had been convicted after entry for violation of laws governing the sale of and manufacture of narcotics, Section 174, Title 21, U. S. C. (R. 43).

Following a hearing, the Special Inquiry Officer on April 24, 1953, found that petitioner was an alien, a native of Italy, who entered the United States after July 1, 1924, for the purpose of residing permanently, found that the three charges lodged against petitioner were sustained, and ordered petitioner deported (R. 151, 152). An appeal taken to the Board of Immigration Appeals by petitioner was dismissed by the Board on July 21, 1953 (R. 158).

Petitioner sought a release on writ of habeas corpus in the Federal District Court on the grounds that (1) he was not given a fair hearing by the Special Inquiry Officer, thereby being denied due process of law, (2) that he did not enter without inspection, and (3) that his deportation because of the narcotics violation and conviction was barred by a recommendation that he not be deported made by the District Judge who sentenced him pursuant to Section 155, Title 8, U. S. C. (R. 1-5). The District Court had jurisdiction of petitioner's application for writ of habeas corpus because of his illegal detention by federal officials.

The principal issue before the Special Inquiry Officer was the date of petitioner's entry, which petitioner testified clearly and unequivocally was December 8, 1923 (R. 14, 18, 28), prior to the effective date of the Act of May 26, 1924, which required an immigrant to possess a visa, and which admittedly petitioner did not have. Respondent attempted to show that petitioner entered the United States subsequent to July 1, 1924 (when a visa was required), and in support thereof offered *only* hearsay, not subject to cross-examination, in the form of *ex parte* written statements of Immigration Service officials saying they had found no record of petitioner having entered at their respective ports of entry on December 8, 1923 (Resp. Exh. 5, R. 16, 65-73; Resp. Exh. 10, R. 30, 91); *ex parte* affidavits and statements made by persons in Italy and documents purportedly copies of Italian court records, all of which were either not sworn to, not certified or authenticated as public records, not certified as having been correctly translated, or not sworn translations, and the tenor of which was that petitioner was in Italy subsequent to December 8, 1923, or even subsequent to July 1, 1924 (Resp. Exh. 7, R. 25, 79, 81; Resp. Exh. 8, R. 26, 83; Resp. Exh. 13, R. 39, 101-137; Resp. Exh. 14, R. 42, 139-143).

None of such evidence would have been admissible in a court of law. As a result, there was no legal evidence to support the finding of the Special Inquiry Officer that petitioner entered after July 1, 1924, when a visa was required. The only legal evidence was the testimony of petitioner that he arrived at New York on the S. S. Paris, December 8, 1923 (R. 14, 18, 28).

The District Judge held in a memorandum opinion (R. 159-167) that "none of the evidence upon which the order of deportation was based would be admissible in any court of justice" (R. 166) and that in view thereof it was his "personal view that a fair hearing was not afforded petitioner," but that the judicial precedents (*U. S.* v. *Curran,* 12 F. 2d 636; *Choy Gum* v. *Backus,* 223 Fed. 487), made the affidavits competent and consequently the hearing fair and impartial (R. 167). He then held that the petitioner could not have been deported as a result of his conviction on a narcotics charge because of the recommendation of the trial judge against it. The District Judge further stated his opinion that Congress did not intend that the McCarran Act should retroactively apply to such cases, but did not decide that question because it was not necessary in view of his finding upon the other issues (R. 167). The District Court denied the application for writ of habeas corpus (R. 168).

Upon appeal from the District Court's denial of the application for writ of habeas corpus, the Court of Appeals affirmed the decision of the District Court (R. 192). In affirming the District Court, the Court of Appeals held that petitioner entered the United States after July 1, 1924, without inspection and without a visa, the hearing accorded him by the Special Inquiry Officer being not unfair because (a) rules of evidence applicable in courts of law need not be followed in deportation hearings; (b) ad-

mission of evidence not legally sufficient in a court does not vitiate deportation proceedings; (c) failure to produce for cross-examination witnesses who cannot be found or procured does not make a deportation hearing unfair; and (d) there were inherent improbabilities in petitioner's testimony as to the date of his arrival (R. 190, 191).

The Court of Appeals also said in its opinion that it need not rule on whether the recommendation of the trial judge who sentenced petitioner for violating the narcotics act that he not be deported bars his deportation under the McCarran Act (8 U. S. C., Sec. 1541(a)(11)) because it upheld the deportation on other grounds (R. 191). However, in answer to the District Court's personal view, *supra*, the Court of Appeals did refer to the opinion of *United States* v. *Murff*, 116 F. Supp. 163, in respect to retroactivity of the McCarran Act (R. 192). The latter case holds that the McCarran Act operates retroactively.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. On the first question here presented, the Court of Appeals erred in holding that petitioner had a fair hearing before the Special Inquiry Officer on the issue as to whether he entered the United States before July 1, 1924, and therefore was not required to have a visa or whether he entered after that date and was required to have a visa (R. 191).

The Special Inquiry Officer's finding that petitioner entered the United States *after* July 1, 1924, without a visa, was not based upon "reasonable, substantial and probative evidence" as required by Section 242(b) of the Immigration and Nationality Act of 1952 (Section 1252(b), Title 8, U. S. C.). All of the evidence offered on behalf

of respondent was hearsay of one kind or another, none of which, as the District Court said (R. 166), "would be admissible in any court of justice." The Court of Appeals held that petitioner did have a fair hearing on the grounds that rules of evidence applicable in courts of law need not be followed in deportation hearings; that lack of opportunity to cross-examine witnesses does not make a deportation hearing unfair; that admission of evidence not sufficient in a court does not "vitiate" deportation proceedings; and petitioner's testimony as to the date of his arrival was improbable (R. 190, 191).

In his petition for rehearing, petitioner pointed out to the court below that even when by statute a federal administrative agency is not bound by the rules of evidence, and even if the agency may in its discretion accept hearsay and any other evidence that is offered, still in the end there must be a *residuum of legal evidence* to support the finding or decision of the agency. Stated more explicitly, although hearsay and other such evidence may be admissible and does not vitiate or render unfair a deportation hearing, such hearsay alone will not sustain a finding or decision of an administrative agency, but in addition there must be some evidence of a type admissible in a court of law which supports such finding or decision. The Court of Appeals denied the petition for rehearing, thereby rejecting petitioner's contention as to the necessity for some legal evidence to support the Special Inquiry Officer's finding of deportability for failure to possess a visa.

In this respect, the Court of Appeals has decided a federal question in conflict with decisions of this court on the same subject (*Bridges* v. *Wixon*, 326 U. S. 135, 65 S. Ct. 1443; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206), and has rendered a decision in conflict

with a decision of the Court of Appeals for the Sixth Circuit on this same matter (*Engel* v. *Zurbrick*, 51 F. 2d 632). Some of the Supreme Court and Courts of Appeals decisions on this subject are collected in *United States ex rel. Dong Wing Ott et al.* v. *Shaughnessy*, 116 F. Supp. 745.

If this court should conclude that the ruling of the Court of Appeals in the case at bar is not in conflict with the foregoing decisions of this court or with the foregoing decision of the Court of Appeals for the Sixth Circuit, as petitioner contends it is, then the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. No one can seriously question the importance of having an authoritative ruling on what type of evidence is the minimum necessary to support a finding and decision by a federal administrative agency, so as to prevent a hearing from being so unfair as to constitute a denial of due process of law. We respectfully submit that if the effect of the cases cited above is not to require a residuum of legal evidence to support a decision of a federal agency, then this court should determine that such is the rule.

2. On the second question here presented, the Court of Appeals erred in ruling that petitioner entered the United States without inspection (R. 191).

On this point, petitioner testified at the hearing before the Special Inquiry Officer that he had paid someone about $300.00 to take him aboard the "S. S. Paris" at Le Havre, France, and that he was given a slip designating him a crew member (R. 29, 36, 37). He also testified that before disembarking he was given a pass to get off, issued by one of the ship's officers, which he exhibited to a man at the foot of the stairs, when he got off the ship. This

man told him to go on (R. 36). On this precise point, respondent offered no testimony.

In his briefs submitted before the decision of the Court of Appeals and in his brief filed with his petition for rehearing, petitioner argued that it must be assumed every person debarking at an official port of entry is passed by an immigration official, whether passenger or crew member; that the only fair inference to be drawn from petitioner's testimony is that the person at the foot of the stairs of the ship who passed petitioner into the United States was an immigration inspector; that he examined petitioner's pass and was afforded an opportunity to make such an inspection of petitioner as he deemed sufficient; and that such opportunity to inspect petitioner satisfied the requirement of inspection even though it later developed that the inspector had not made as complete an inspection as he should have made (R. 197).

The Court of Appeals failed to comment on this contention in its opinion and denied the petition for rehearing without opinion. In this respect the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter (*United States* v. *Southro*, 8 F. 2d 1023, 6 Cir., affirming, and approving the opinion in, *Ex parte Gouthro*, 296 Fed. 206 (D. C.)).

In the event this Court concludes that the decision of the Court of Appeals on the second question here presented is not in conflict with the foregoing decision of the Court of Appeals for the Sixth Circuit, then the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. In light of the changes brought about in the administration of the laws affecting aliens by the Immigration and Nationality Act of 1952, it is important that the

question of whether an alien has complied with the requirement of an inspection by affording the Immigration Service an *opportunity to inspect* him be decided by this court.

3. If this court should rule affirmatively on the first two questions above presented and hold that petitioner did not have a fair hearing as to his date of entry and that inspection and opportunity to inspect are synonymous, then the Court of Appeals erred in not passing upon petitioner's contention that he is not deportable under Section 241(a)-(11) of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1251(a)(11)) as a result of his narcotics conviction because of the recommendation of the judge who sentenced him that he not be deported.

This point was pressed below by petitioner but not passed upon by the Court of Appeals because it was not passed upon by the District Court, which had concluded that it was unnecessary to a disposition of the case in view of its finding on other issues (R. 167, 191). This court can consider and decide this issue even though it was erroneously not passed upon below. *Liberty Oil Co.* v. *Condon National Bank et al.*, 260 U. S. 235, 43 S. Ct. 118.

Following petitioner's conviction on a violation of the narcotics laws in 1943, the District Judge who sentenced him, pursuant to Section 175, Title 21, U. S. C., and Section 155, Title 8, U. S. C., recommended that petitioner not be deported because of said conviction (Resp. Exh. 9, R. 27, 88). Although the Immigration laws were subsequently amended by Congress, such amendments were held not to affect rights of aliens acquired under such recommendation of no deportation. *Dang Nam* v. *Bryan*, 74 F. 2d 379 (C. C. A. 9); *United States* v. *George Wing*, 6 F. 2d 896 (D. C. Calif.); *Ex parte Eng*, 77 F. Supp. 74 (D. C., Calif.).

Respondent took the position below that the Immigration and Nationality Act of 1952 is retroactive and abrogates petitioner's right not to be deported for the narcotics conviction under the recommendation of the trial judge who sentenced him. This is in conflict with the decisions of this court in *Harvey* v. *Taylor,* 69 U. S. 328; *Cameron* v. *United States,* 231 U. S. 710, 712, 34 S. Ct. 244; and *Chew-Heong* v. *United States,* 112 U. S. 536, 559, 5 S. Ct. 255, providing statutes should be construed to be prospective unless it is clearly indicated they were meant not to be.

Not only should statutes be construed to act prospectively—not retroactively, especially where it adversely affects rights previously vested, unless the intention of the legislature is so clear to the contrary as to leave no doubt, but the savings clause of the Immigration Act of 1952, Section 405(a),* Ch. 477, 66 Stat. 280 (8 U. S. C., Sec. 1101, note), indicates clearly that Congress intended the Act of 1952 not to be retroactive and that the status of petitioner as an alien convicted of a narcotic violation but not deportable because of the recommendation of the sentencing judge is preserved under the McCarran Act; *United States ex rel. De Luca* v. *O'Rourke,* ..... F. 2d ..... (8 Cir., June 17, 1954). See and compare recent case, *Petition of Menasche,* 115 F. Supp. 434. The Court of Appeals in its

*"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect * * * proceedings, civil or criminal brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter civil or criminal, done or existing, at the time this Act shall take effect; but as to all such * * * proceedings, statutes (so in original; probably should read 'statuses'), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in full force and effect. * * *"

opinion cited *United States* v. *Murff,* 116 F. Supp. 163, but that decision does not consider the savings clause of the Act, and we do not consider it persuasive here for that and other reasons.

In any event, the Court of Appeals by referring to *United States* v. *Murff, supra,* on the issue of retroactivity of the Act of 1952, in connection with petitioner's claim that he is not deportable because of his conviction of a narcotics violation (R. 191, 192), has in effect decided an important question of federal law which has not been, but should be, settled by this Court. It seems too clear to justify further discussion in the brief space here permitted that the newness of the Immigration Act of 1952 makes highly important a decision as to whether such Act operates retroactively so as to abrogate rights of an alien previously acquired under an order of the District Court that he not be deported.

Since the decision of the Court of Appeals here involved was rendered, and while this petition was near completion, the Court of Appeals for the Eighth Circuit has had before it for decision the question of whether the recommendation of a trial judge that an alien convicted of a violation of the narcotics laws not be deported, is effective to prevent his deportation under Section 241(a)-(11), of the Act. In that case, *United States ex rel. De Luca* v. *O'Rourke,* decided June 17, 1954 (opinion printed in Appendix to this petition), the Court of Appeals held that the savings clause of the McCarran Act seems to be broad enough to preserve the efficacy of the recommendation of the sentencing judge and to prevent the deportation of the alien because of the conviction.

In light of the subsequent decision in the *De Luca* case, the Court of Appeals created confusion on this issue in the case at bar by referring in its opinion to *United*

States v. *Murff, supra,* apparently with approval. In any event in the *De Luca* case, the Court of Appeals invites consideration of this issue by this Court when it says that this question can be put at rest "only by the Supreme Court or by an amendment to the Act."

Wherefore, your petitioner respectfully prays that, for the reasons herein set forth, a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit to the end that this case may be reviewed and determined by this Court, that the judgment of said Court of Appeals may be reversed by this court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

Nicolo Impastato,
Kansas City, Missouri,
Petitioner.

JAMES DALEO,
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Attorney for Petitioner.

APPENDIX.

Text of Statutes and Constitutional Provisions Involved.

Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;

Sec. 242. (b) * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall

prescribe. Such regulations shall include requirements that—

* * *

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [statuses], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

United States Constitution, Amendment V:—

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,995.

United States ex rel. Giuseppe (Joseph) DeLuca,
Appellant,
vs.
J. L. O'Rourke, District Director, Immigration and Naturalization Service, Justice Department,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[June 17, 1954.]

R. T. Brewster (Hunt C. Moore was with him on the brief), for Appellant.

Horace Warren Kimbrell, Assistant United States Attorney (Edward L. Scheufler, United States Attorney, and William O. Russell, Assistant United States Attorney, were with him on the brief), for Appellee.

Before SANBORN, JOHNSEN and COLLET, Circuit Judges.

SANBORN, Circuit Judge.

Giuseppe (Joseph) DeLuca, an alien in custody under a warrant for deportation issued October 15, 1953, by the Acting District Director, Kansas City District, Immigration and Naturalization Service, Department of Justice, petitioned the District Court for release on habeas corpus. The court issued an order to show cause directed to the re-

spondent, J. L. O'Rourke, District Director, United States Immigration and Naturalization Service, Department of Justice, (appellee). After his response to the order and after a hearing, the court denied and dismissed the petition. DeLuca has appealed.

The order for the deportation of DeLuca, in so far as it was sustained by the Board of Immigration Appeals, was based upon findings of the Special Inquiry Officer of the Immigration and Naturalization Service who conducted the deportation hearing, that DeLuca was an alien who had twice been convicted and sentenced for violating the law relating to the importation and sale of narcotic drugs and who was therefore subject to deportation under Section 241(a)(11) of the Immigration and Nationality Act, 66 Stat. 163 et seq., effective December 24, 1952, 8 U.S.C., 1952 Ed., § 1251(a)(11). Section 241(a)(11) provides as follows:

"(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * * * * *

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate."

DeLuca, a sixty-year old alien, had first come to the United States in 1910 from Italy, where he was born, and had last entered the United States in 1934 from Italy as a returning resident. Two judgments of conviction were entered against him on March 27, 1943, in the United States District Court for the Western District of Missouri, one based upon the verdict of a jury finding him guilty under an indictment, based on 21 U.S.C. [1940 Ed.] § 174, the "Narcotic Drugs Import and Export Act", charging him and others with the concealment of narcotic drugs, knowing them to have been imported unlawfully into the United States; the other conviction based on his plea of guilty to an indictment under the same statute,[1] charging him and others with the sale of narcotic drugs, knowing them to have been unlawfully imported into the United States. The District Court sentenced DeLuca to three years imprisonment for each offense, the sentences to be served concurrently.

DeLuca admitted that he was an alien who had been convicted of violations of law relating to the illicit traffic in narcotic drugs. One of his main contentions in the District Court in the habeas corpus proceedings was that, under an agreement with the United States Attorney whereby DeLuca was to forego an appeal from the judgment of conviction entered upon the jury verdict under the first indictment and was to enter a plea of guilty to the second indictment, in consideration of the United States Attorney recommending to the court that DeLuca be given a certain sentence and that the court recommend to the Attorney General that DeLuca be not deported, he had, in effect, ac-

[1]The judgment imposed under the second indictment bore the caption "Criminal indictment in one count for violation of U.S.C., Title 26, Sec. 2553." This was a mistake, since the crime charged in the indictment and described in the judgment was clearly under Section 174 of Title 21 U.S.C.

quired the status of a nondeportable alien, the court having accepted the recommendations of the United States Attorney and having recommended to the Attorney General in each of the cases that DeLuca be not deported. DeLuca also contended that to give Section 241(a)(11) of the Immigration and Nationality Act of 1952 a retrospective effect would be violative of his constitutional rights.

Judge Reeves, who sentenced DeLuca and who also entered the order from which he has now appealed, made timely recommendations, in conformity with Section 155(a) of Title 8 U.S.C. [1940 Ed.], to the Attorney General that DeLuca be not deported because of his convictions upon charges of having violated Section 174 of Title 21 U.S.C. [1940 Ed.].

At the time Judge Reeves, in 1943, imposed sentences upon DeLuca, Section 155(a) of Title 8, U.S.C., 1940 Ed., provided as follows:

"(a) * * * The provisions of this section respecting the deportation of aliens convicted of a crime *involving moral turpitude* shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter; * * *."

Section 175 of Title 21 U.S.C., 1940 Ed., provided:

"§175. Any alien who at any time after his entry is convicted under section 174 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance

with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections."

In the habeas corpus proceeding, Judge Reeves reached the conclusion that his recommendations to the Attorney General that DeLuca be not deported were unauthorized and ineffective because the crimes of which DeLuca was convicted were not crimes involving moral turpitude. But the Judge's recommendations were presumptively valid and there is nothing in the record to show that the crimes were not of such a character as to involve moral turpitude. We note that in the decision of the Board of Immigration Appeals in this case the following statement appears: "It is conceded that prior to the Immigration and Nationality Act an alien convicted of the offenses in question thereby became deportable, but that a recommendation against deportation was effective to prevent deportation."

While it is no doubt true that there may be technical, inadvertent and insignificant violations of the laws, relating to narcotics, which do not involve moral turpitude, there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic. The evils which result from unlawfully importing or dealing with unlawfully imported narcotic drugs are a matter of common knowledge. Even the federal laws relating to the domestic traffic in narcotic drugs, which were sustained as revenue measures, were recognized as having a moral purpose as well as that of raising revenue. *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402; *United States* v. *Doremus*, 249 U.S. 86, 94. In *United States* v. *Balint*, 258 U.S. 250, 253, the court said: "The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs."

In *Jordan* v. *De George*, 341 U.S. 223, 232, it was held that all crimes in which fraud is an ingredient are crimes involving moral turpitude, and that a conspiracy to defraud the United States of taxes on distilled spirits was such a crime within the meaning of §19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C., 1940 Ed., §155(a), and required the deportation of an alien sentenced more than once to imprisonment for one year or more because of conviction for crime involving moral turpitude. The crime of dealing with narcotic drugs known to have been smuggled into the United States is certainly no less reprehensible and probably no less a fraud upon the revenues than the offenses involved in the *Jordan* case.

The following cases support the view that, prior to the Immigration and Nationality Act of 1952, the recommendation of a sentencing judge against the deportation of an alien convicted of a violation of the law relating to the illicit traffic in narcotics, such as the violations here involved, was effective to prevent deportation. *Dang Nam* v. *Bryan*, 9 Cir., 74 F.2d 379, 380-381; *Ex parte Eng*, D.C.N.D. Cal., 77 F. Supp. 74, 77.

It is our opinion that, because of the timely recommendations of Judge Reeves to the Attorney General that DeLuca be not deported because of his convictions in 1943, he was not, prior to the effective date of the Immigration and Nationality Act of 1952, subject to deportation because of such convictions. We do not agree, however, that the recommendations of the United States Attorney to the District Judge and the District Judge's recommendations to the Attorney General, under the circumstances disclosed by the record, constituted a binding contract between the United States and DeLuca that he should never be deported because of the convictions. As an alien, DeLuca could not acquire a right to permanent residence in the

United States which Congress was bound to respect, nor could the United States Attorney or the District Judge impair the power of Congress to provide for the deportation of aliens whom it considered undesirable.

Judge Learned Hand, speaking for the United States Court of Appeals for the Second Circuit, in *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F.2d 489, 490, said:

"The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate."

Aliens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to their civil and criminal responsibility. "But they continue to be aliens, * * * and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." *Fong Yue Ting* v. *United States,* 149 U.S. 698, 724.

Legislation providing for the deportation of aliens is not invalid because retrospective in operation. *Mahler* v. *Eby,* 264 U. S. 32; *United States ex rel. Eichenlaub* v. *Shaughnessy,* 338 U.S. 521, 529; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594-595; *Galvan* v. *Press,* ____ U.S. ____, *decided* May 24, 1954; *United States ex rel. Barile* v. *Murff,* D.C. Md., 116 F. Supp. 163.

We find no merit in DeLuca's contention that he did not have a fair hearing before the Special Inquiry Officer

because DeLuca's case was added to the Attorney General's deportation list of cases to be given priority of treatment. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. Compare *Donnelly Garment Co.* v. *National Labor Relations Board*, 8 Cir., 151 F.2d 854, 870-873, with *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 236-237. Moreover, there was no dispute as to the facts in DeLuca's case. The only issues were those of law which have been considered not only by the Special Inquiry Officer but by the Board of Immigration Appeals and the District Court. Cf. *United States ex rel. Marcello* v. *Ahrens*, D.C. E.D. La., 113 F. Supp. 22, 24.

The difficulty we have with this case is in spelling out any clear-cut authorization for the deportation of an alien such as DeLuca who was convicted of crimes involving moral turpitude but was saved from deportation because of the recommendations of the sentencing judge. Section 175 of Title 21 U.S.C., 1940 Edition, (hereinbefore quoted) indicated that Congress considered violations of Section 174 of that Title as crimes involving moral turpitude, since §175 made aliens convicted on narcotic charges under §174 deportable "in accordance with the provisions of sections 155 and 156 of Title 8 * * *," and since §155 related to deportation of aliens convicted of crimes involving moral turpitude, and §156 related to the manner of their deportation.

Whether Section 241(a) of the Immigration and Nationality Act of 1952, §1251(a) of Title 8 U.S.C., 1952 Ed., changed the status of DeLuca from a nondeportable alien to a deportable alien, we think is not clear. His status prior to the Act was that of an alien convicted and sentenced for crimes involving moral turpitude, but not sub-

ject to deportation because of the recommendations of the sentencing judge. Section 241(a)(4) of the Act, §1251(a)-(4) of Title 8 U. S. C., 1952 Ed., provides for the deportation of an alien who

"is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

Section 241(a)(4) of the Act does not expressly exclude an alien convicted and sentenced for a crime involving moral turpitude which is also a violation of a law relating to the illicit traffic in narcotic drugs, and Section 241(b) of the Act, §1251(b) of Title 8 U.S.C., 1952 Ed., provides that Section 241(a)(4) shall not apply if the sentencing court shall make a timely recommendation to the Attorney General that the alien be not deported.

It is true that Section 241(b) of the Act does not expressly authorize such recommendations with respect to an alien who at any time after entry has been a "narcotic drug addict, or who at any time has been convicted of any law or regulation relating to the illicit traffic in narcotic drugs." Section 241(a)(11) of the Act, §1251(a)(11) of Title 8, U.S.C., 1952 Ed.

It can be argued that by putting aliens who were drug addicts or were convicted of violations of the narcotic laws in a class distinct from those who were convicted and sentenced for crimes "involving moral turpitude", Congress intended to deprive aliens who prior to the effective

date of the Act had been convicted of violations of narcotic laws but were nondeportable because of the recommendations of the sentencing judge, of their nondeportable status and to invalidate all such recommendations so far as narcotic convictions were concerned.

On the other hand, it can be argued that DeLuca was an alien who came within Section 241(a)(4) of the Act, as to whom the recommendations of no deportation would still be effective notwithstanding the provisions of Section 241(a)(11).

To increase the uncertainty as to whether Congress intended to deprive an alien such as DeLuca of the benefit of the recommendations of the sentencing court, we have the so-called savings clause, Section 405(a) of the Act, 66 Stat. 280 (Note following §1101, 8 U.S.C., 1952 Ed., page 734), which, so far as pertinent, reads as follows:

"Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or *other document* or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or *any status*, condition, right in process of acquisition, *act*, thing, liability, obligation, or matter civil or criminal, *done or existing*, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, *acts*, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect." (Italics supplied.)

We question whether it is specifically provided in the Act that an alien convicted upon a narcotic charge involving moral turpitude, who the sentencing judge recommended should not be deported, should, nevertheless, be deported because of his conviction. Unless there is such a specific provision, it would seem that the savings clause is broad enough to preserve the efficacy of the recommendation of the sentencing judge and to prevent the deportation of the alien because of the conviction.

The record indicates that, since his convictions, DeLuca has been a law-abiding resident alien. The disastrous consequences of deportation to him would be so far out of proportion to any benefit the United States could seemingly derive from his removal from the country as to entitle him to have any reasonable doubts as to his deportability resolved in his favor. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving DeLuca of the status of a nondeportable alien resulting from the recommendations of the sentencing judge that he be not deported.

The judgment appealed from is reversed and the case is remanded with directions to discharge DeLuca from custody under the order and warrant for deportation.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 192

UNITED STATES OF AMERICA
EX REL. NICOLO IMPASTATO, PETITIONER

v.

J. L. O'ROURKE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 186-192) is reported at 211 F. 2d 609. The opinion of the District Court (R. 159-167) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1954 (R. 192), and a petition

for rehearing was denied on May 18, 1954 (R. 193-199). The petition for a writ of certiorari was filed on July 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the evidence adduced at petitioner's deportation hearing supports the findings that he had illegally entered the United States without an immigration visa required by statute, and without inspection.

STATUTES INVOLVED

Pertinent provisions of the Immigration and Nationality Act, 66 Stat. 163, enacted June 27, 1952, and effective December 24, 1952, are as follows:

Section 241(a), 66 Stat. 204:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General * * *.

Section 291, 66 Stat. 235:

> * * * In any deportation proceeding * * * against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States

* * *. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

Section 13(a), Act of May 26, 1924, 43 Stat. 153, 161 provided:

> No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

Section 16, Act of February 15, 1917, 39 Stat. 874, 885, provided:

> * * * That the inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Secretary of Labor and under such regu-

lations as he may prescribe. Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; * * *. All aliens coming to the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section three thereof. * * *

STATEMENT

A warrant for the arrest of the alien petitioner was served on September 24, 1951, charging that he was subject to deportation in that at the time of his entry into this country at an unknown port subsequent to July 1, 1924, he was not in possession of a valid immigration visa under the Immigration Act of May 26, 1924 (R. 6-7).

At the deportation hearing, which commenced on December 16, 1952 (R. 9), and was continued until April 13, 1953 (R. 34), an important contested issue was the date of petitioner's arrival in the United States, petitioner testifying that he arrived at New York on the SS *Paris* on December 8, 1923, when an immigration visa was not required, with the intention of residing permanently in the United States (R. 14, 28-29) while the Service contended that he arrived subsequent to July 1, 1924, without the valid immigration visa required by the 1924 Act. The Service introduced Exhibit 4 showing that in 1947 the Assistant Commissioner canceled petitioner's certificate of lawful entry, obtained in 1941 by fraud through the use of false affidavits (R. 14-15, 59-64). Exhibit 7 was an affidavit by an Italian Onorata Vitale, sworn to before the American vice consul at Palermo, that on June 25, 1924, petitioner had stolen figs from her property in Cinisi in the province of Palermo (R. 24-25, 79, 81). Exhibit 8 was an affidavit by an Italian Dosi, sworn to before the American consul at Rome, showing that petitioner was mentioned in the official records of the Italian police as having been in Italy during the years 1924, 1925 and 1926 (R. 25-26, 83).[1] Exhibit 13 introduced at the adjourned date contained a statement by two policemen that on June

[1] Exhibits 7 and 8 stated that Nicolo Impastato was born at Cinisi, Italy, on June 1, 1900, as the son of Giacomo Impastato and Marianna Berretta, this agreeing with testimony by petitioner as to his parentage (R. 20, 39, 55).

25, 1924, they had seen petitioner stealing figs from the property of Onorata Vitale in Cinisi; and disclosed proceedings in the Penal Court of Palermo on that date against petitioner for this theft and a sentence of amnesty on September 30, 1925 (R. 39, 129, 131). Exhibit 14 was a certificate from the Office of the Solicitor of the Republic of Palermo showing that on November 27, 1928, petitioner was sentenced to five years' imprisonment for association with a criminal band, and that amnesty was granted on February 7, 1933 (R. 40-42, 141, 143).

Petitioner introduced Exhibit 11, an affidavit of the mayor of Cinisi to the effect that petitioner left there to go to America in 1923 (R. 31, 93, 95). At the continuation of the hearing on April 13, 1953 (R. 34), petitioner's counsel related his unsuccessful attempt to examine Onorata Vitale and introduced Exhibit 12, the affidavit of an Italian doctor showing ailments affecting her memory and intelligence (R. 35, 97, 99).

Petitioner testified that he paid $300 to a man at the waterfront in Le Havre, France, for his trip on the SS *Paris* to the United States; that a crew member gave him a slip of paper for a pass to get off the ship; that when he left the ship he showed his pass to "a man at the foot of the stairs" and was told to go on; and that he did no work on the ship during the course of the voyage. When asked if he made known to anyone at the port of New York who could have been an immigration officer

that he intended to remain in the United States, he testified, "Nobody asked me." (R. 35-38.)

There was also introduced in evidence Exhibit 9 disclosing petitioner's conviction and a two-year prison sentence imposed by the United States District Court at Kansas City, Missouri, on April 13, 1943, on his plea of guilty to the offense of concealing and facilitating the concealment of heroin in violation of 21 U.S.C. 174, and a recommendation by the district judge that this conviction should not be used as a basis for deportation (R. 26-27, 85-90).

The examining officer then lodged these additional charges as grounds for deportation against petitioner: (1) under Section 241(a)(11) of the Immigration and Nationality Act of 1952 (hereinafter referred to as the Act) by reason of his narcotics conviction under 21 U.S.C. 174; (2) under Section 241(a)(2) of the Act in that he had entered without inspection (R. 27, 42-43). There was also reiteration of the charge under Section 241(a)(1) of the Act that at the time of entry he was not in possession of a valid immigration visa, in violation of Section 13(a) of the Act of May 26, 1924 (R. 42-43).

Petitioner testified that he had never obtained an immigration visa from an American consul abroad (R. 43), and that he did not have any evidence to show that he had resided in the United States since December 8, 1923 (R. 44). The special inquiry officer advised petitioner that if he could obtain employment records tending to show

that he entered the United States prior to July 1, 1924, the hearing would be reopened (R. 45-46), but petitioner did not thereafter produce such evidence.

The special inquiry officer ordered petitioner deported on all three of the stated grounds, and denied petitioner's request for voluntary departure (R. 149-153). The Board of Immigration Appeals dismissed petitioner's appeal from this decision (R. 154-158).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri alleging *inter alia* (1) that he was not subject to deportation under Section 241(a)(11) since the sentencing court had recommended against deportation; (2) that he was not subject to deportation under Sections 241(a)(2) and 241(a)(1) since he entered the United States prior to July 1, 1924; (3) that he was denied a fair hearing; and (4) that there was no substantial evidence to support the findings of the special inquiry officer and the Board. A copy of the proceedings and the exhibits introduced at the hearing were attached to the petition. (R. 1-5.) Respondent filed a motion to dismiss and an answer to the habeas corpus petition, attaching to the answer the opinions by the special inquiry officer and the Board of Immigration Appeals (R. 145-158). The District Court, in denying the habeas corpus petition, ruled that the deportation hearing was fair, and that the finding that petitioner had entered the United States after July 1, 1924, was supported by

competent evidence. The court considered it unnecessary to decide the question of petitioner's deportability by reason of his narcotics conviction. (R. 159-168.)

On appeal (R. 168-169) the Court of Appeals unanimously affirmed (R. 186-192). It ruled that petitioner had not demonstrated that the deportation hearing was unfair despite the use of *ex parte* affidavits from Italy, and that the finding that petitioner had entered after July 1, 1924, without inspection and without a visa was supported by the evidence. Since the deportation order was valid on these grounds, the court did not undertake to decide the question of petitioner's deportability arising out of his narcotics conviction. (R. 191.)

ARGUMENT

1. Petitioner's principal contention is that he was denied procedural due process in the deportation hearing in that the Italian documents introduced by the government to show that he had entered the United States after July 1, 1924, were hearsay, and he had no opportunity to cross-examine the declarants (Pet. 7-9). It is, however, well established that a deportation hearing is not rendered unfair merely because rules of evidence applicable in judicial proceedings have not been strictly followed or because evidence has been improperly admitted. The defect must be such as to lead to a denial of justice. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *United States ex rel. Vatjauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106;

United States ex rel. Tisi v. *Tod,* 264 U. S. 131, 133; *United States ex rel. Smith* v. *Curran,* 12 F. 2d 636, 637-638 (C. A. 2); *United States ex rel. DiTomasso* v. *Martineau,* 97 F. 2d 503, 504 (C. A. 2); *United States ex rel. Doukas* v. *Wiley,* 160 F. 2d 92, 95 (C. A. 7); *Moncado* v. *Ramsey,* 167 F. 2d 191, 196 (C. A. 8); *Nicoli* v. *Briggs,* 83 F. 2d 375, 377 (C. A. 10). In particular, the use of affidavit evidence has been upheld where witnesses are unavailable, and no request is made for their production. *United States ex rel. Ng Wing* v. *Brough,* 15 F. 2d 377, 379 (C. A. 2); *United States ex rel. Diamond* v. *Uhl,* 266 Fed. 34, 40 (C. A. 2); *Quock So Mui* v. *Nagle,* 11 F. 2d 492, 493 (C. A. 9).

Under Section 291 of the Act the burden of proof in the deportation proceeding was upon the alien petitioner "to show the time, place, and manner of his entry into the United States." If he did not sustain this burden he would be "presumed to be in the United States in violation of law."

Petitioners' principal evidence that he entered at New York on December 8, 1923, on the SS *Paris,* was his own testimony. The special inquiry officer and the Board of Immigration Appeals could have refused to credit his testimony in view of the fact that he previously had obtained by fraud a certificate of lawful entry (*supra,* p. 5). At this point, without more, petitioner would have failed to carry the burden, placed upon him by Section 291, proving the time, place and manner of his entry. For his only other evidence was the affidavit of the

mayor of Cinisi, Italy, that petitioner had emigrated to America in 1923, a statement which was as ex parte and hearsay as the Service exhibits to which he objects. The petitioner failed entirely to produce any evidence of the type which presumably would exist if he had commenced to reside here in 1923—such as employment records.

Moreover, the Service, instead of relying solely upon the petitioner's failure of proof as it was entitled to do, undertook to prove that petitioner did not arrive in this country prior to June 1, 1924, by the only practical method of establishing that fact, i.e., by showing that he was somewhere else until after that date. For that purpose, the Service introduced affidavits of Italians and Italian penal records demonstrating that petitioner was in Italy during 1924 and several years thereafter. Even assuming, *arguendo,* that these documents would have been inadmissible in a judicial proceeding, their use was entirely proper in this context. As Judge Learned Hand put it in *N. L. R. B.* v. *Remington Rand,* 94 F. 2d 862, 873 (C. A. 2), certiorari denied, 304 U. S. 576, "* * * hearsay [may support a finding], at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." Stated otherwise, in the instant case the documentary evidence (necessarily obtained in Italy) adduced by the Service to show petitioner's presence in Italy in 1924 and for sometime thereafter, coupled with petitioner's conspicuous failure to carry his statu-

tory burden of proving the time, place and manner of his entry into the United States, constitutes the "reasonable, substantial, and probative evidence" required by Section 242(b) of the Immigration and Nationality Act, 66 Stat. 210, to support a deportation order.

There is no substance in petitioner's contention that the court below erred in ruling that petitioner entered the United States without inspection, the argument being that opportunity for inspection was shown despite the lack of actual formal inspection (Pet. 9-11).[2] Section 16 of the Act of February 15, 1917, 39 Stat. 885, in effect at the time of petitioner's claimed entry into the United States, contained comprehensive provisions for inspection of arriving aliens by immigration officers. Petitioner could give only a vague description of the paper allegedly given to him as some sort of pass to enable him to leave the ship. He was unable to furnish definite information about the "man at the foot of the stairs" to whom he showed the purported pass, and did not describe him as an immigration inspector. Petitioner admitted that he was not questioned by any immigration officer regarding his right to enter the United States, and that he did not make known to any-

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[2] Illegal entry without inspection is a well-established ground for deportation of aliens. Cf. *United States ex rel. Natali* v. *Day*, 45 F. 2d 112, 113 (C.A. 2); *Bukta* v. *Zubrick*, 50 F. 2d 593, 594 (C.A. 6); *Ex parte Saadi*, 26 F. 2d 458 (C.A. 9); *Singh* v. *United States*, 243 Fed. 557, 558 (C.A. 9); *Lidonnici* v. *Davis*, 16 F. 2d 532 (C.A. D.C.), certiorari denied, 274 U. S. 744.

one at the port of New York who could have been an immigration officer that he intended to remain in the United States. In order to obtain entry, it was necessary for him to pay $300 to a stranger whom he met at a waterfront saloon at Le Havre, France. (R. 35-38.) The reasonable inference to be drawn from petitioner's story is that he was illegally smuggled into the United States; and he clearly was not given the required statutory inspection.[3]

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[3] Since the upholding of the deportation order is so clearly sustained on the two grounds that petitioner did not have the required immigration visa and was not given the necessary statutory inspection upon entry, we do not deem it necessary to discuss petitioner's third point (Pet. 11-14) to the effect that he could not be deported by reason of his narcotics conviction after the District Court recommended against deportation for this offense. Neither of the courts below passed upon the issue (R. 167, 191), although the special inquiry officer and the Board had both decided it adversely to petitioner (R. 150-151, 156-157). Under the decision of the Court of Appeals in *United States ex rel. DeLuca* v. *O'Rourke* (C.A. 8) [Pet. 17-27, Government's motion for rehearing overruled July 14, and mandate ordered to go down to District Court on July 26, 1954], petitioner could not be deported on such ground.

CONCLUSION

This case was correctly decided by the courts below, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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